A **MOHAMAD JAMALUDIN MOHAMAD AMIN**

**v.**

**ZALINA ISA**

B HIGH COURT MALAYA, ALOR SETAR
ZAMANI A RAHIM JC
[ORIGINATING MOTION NO: 25-07-2009]
8 MARCH 2010

C ***LEGAL PROFESSION:*** *Advocates and solicitors - Misconduct - Suspension from practice - Appeal - Advocate and solicitors refusing to release to client balance of loan amounts paid into client's account - Finding by Disciplinary Committee that advocate and solicitor guilty of misconduct - Disciplinary Board suspending advocate and solicitor from*
D *practice for three years notwithstanding fine of RM5,000 recommended by Disciplinary Committee - Whether court to interfere with decision of Disciplinary Board - Punishment must depend on each individual case*

***LEGAL PROFESSION:*** *Disciplinary proceedings - Disciplinary Board*
E *- Disciplinary Board suspending advocate and solicitor from practice for three years notwithstanding fine of RM5,000 recommended by Disciplinary Commission - Whether court ought to interfere*

***LEGAL PROFESSION:*** *Professional discipline - Misconduct - Suspension from practice - Appeal against - Discretion of Disciplinary*
F *Board - Whether court should interfere - Whether conduct unbefitting of an advocate and solicitor - Whether there were grounds to disagree with decision of Disciplinary Board - Legal Profession Act 1976, ss. 94(3), 103D*

G ***LEGAL PROFESSION:*** *Professional discipline - Procedure - Notice - Allegation that Disciplinary Board gave notice under s. 103D(2) Legal Profession Act 1976 but acted under s. 103D(3) - Whether notice was sufficient compliance with s. 103D(4)*

H The appellant appealed under s. 103E of the Legal Profession Act 1976 ('the Act') against the order of the disciplinary board ('DB') made under s. 103D of the Act, *inter alia*, suspending the appellant from practicing as an advocate and solicitor for three years. The appellant had acted as a solicitor in a sale and purchase transaction
I for the sale of the respondent's house ('the property'). The purchaser's bank loan for the purchase of the property was duly released. After settling the redemption sum, the balance of the loan

amounting to RM40,543.43 was paid into the appellant's firm's client's account as stakeholder. RM37,743.43 was to be released to the respondent and the balance of RM2,800 was to be returned to the purchasers. The respondent and the appellant quarrelled with regard to the amount due to the respondent. According to the appellant, the respondent had agreed to pay him RM3,000 for negotiating the sale of the property together with the sum of RM5,000 owed to him by the respondent's husband. The appellant was willing to pay the respondent the balance of the purchase price after deducting the RM8,000. As the respondent refused to acknowledge the debt, the appellant withheld the balance loan payment due to the respondent. The respondent thus complained to the Bar Council. After the complaint was made, the appellant returned RM42,256.57 to the respondent and agreed to pay the balance RM10,743.43 soon. The Disciplinary Committee ('DC') found that the appellant had misappropriated the monies and was therefore guilty of a misconduct under s. 94(3)(c) and (o) of the Act. The DC recommended a fine of RM5,000. The DB however disagreed with the recommendation and issued a notice to the appellant under s. 103D(2), (4) and (5) of the Act to appear before the DB on 21 March 2009 and to make representations to the DB. The DB finally suspended the appellant from practice for three years. The appellant appealed on the grounds that: (i) there was no evidence that the appellant had dishonestly and/or unlawfully withdrawn or misappropriated even a cent from the Client Account or from the sum of RM40,543.43; (ii) as the DB gave the appellant a notice under s. 103D(2) but acted under s. 103D(3), it contravened the mandatory provision of s. 103D(4) which nullified the whole proceedings of the DB; and (iii) the punishment imposed by the DB was excessive in the circumstances of the case.

A B C D E F G

**Held (dismissing the appeal and affirming the order made by the DB):**

**(1)** The finding by the DC that the appellant had misappropriated the sum of RM40,543.43 was clearly a finding of fact. Misappropriation of property or money entrusted to legal practitioners is not only a misconduct within the Act but also a serious criminal offence. If dishonesty is established, even temporary retention is evidence of the offence. (paras 17 & 18)

H I

**(2)** The court is cautious to disturb the decision by the DB that the appellant's conduct is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute. The duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners is entrusted to the Bar Council and the DB. This is because members of the same profession should know and appreciate better than anyone else the standard of conduct expected of the legal profession. (para 19)

**(3)** The appellant could have no valid complaint against the said Notice nor could the appellant have any valid complaint that s. 103D(3) instead of s. 103D(2) had been cited and acted upon by the DB. The notice was obviously a notice under s. 103D(4). The said notice was sufficient compliance with s. 103D(4) which houses the doctrine of natural justice and procedural fairness. (paras 35, 36 & 38)

**(4)** The imposition of punishment in the disciplinary proceedings under the Act cannot be standardised as punishments are discretionary, it must depend on each individual case and its mitigating factors. The DB knows best why the suspension of three years was meted out on the appellant. On the facts of the case, the appellant too failed to conjure up any sympathy for the court to reduce to a lesser punishment. (paras 42 & 43)

**Case(s) referred to:**

*Au Kong Weng v. Bar Committee Pahang [1980] 1 LNS 4 FC* ***(refd)***
*Bhandari v. Advocates Committee [1956] 3 All ER 742* ***(refd)***
*Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA* ***(refd)***
*Emperor v. Chaturbhu Narain Choudhury AIR [1936] Patna 350* ***(refd)***
*Keith Sellar v. Lee Kwang [1980] 1 LNS 36 FC* ***(refd)***
*Marzaini Zainuddin v. Majlis Peguam Malaysia [2007] 10 CLJ 339 HC* ***(refd)***
*Re an Advocate and Solicitor [1940] MLJ 253* ***(refd)***
*Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah [2009] 1 CLJ 872 FC* ***(refd)***
*Thavanathan Balasubramanium v. Majlis Peguam Malaysia [2003] 3 CLJ 770 HC* ***(refd)***

**Legislation referred to:**

Federal Constitution, art. 8
Legal Profession Act 1976, ss. 88A, 94(3)(c), (d), (n), (o), 99, 100(3), (8), 103A(1)(a), 103D(2), (3), (4), (5), 103E, 108

**Other source(s) referred to:**
*Mallal's Criminal Procedure,* 4th edn, p 467

*For the appellant - Kartar Singh Dhaliwal; M/s Aqbal & Assocs*
*For the respondent - Nizan Azdahari; M/s Dasuki & Co*
*For the Bar Council - Murshidah Mustafa; M/s Shearn Delamore & Co*
*For the Disciplinary Board as amicus curae - Fazleeza Azli*

*Reported by Amutha Suppayah*

## JUDGMENT

**Zamani A Rahim JC:**

**[1]** This is an appeal under s. 103E of the Legal Profession Act 1976 (the Act) against the order of the disciplinary board (DB) made under s. 103D of the Act, *inter alia*, suspending the appellant from practicing as an advocate and solicitor of the High Court of Malaya for a period of three (3) years.

**[2]** The grounds of appeal are that, *inter alia*, the order of the DB is null and void and of no legal effect.

**[3]** The brief facts of the case are as follows.

**[4]** The appellant is an advocate and solicitor of the High Court of Malaya and at all material time practised under the firm of Jamaludin & Co. ("the appellant's firm"). He acted as a solicitor in a sale and purchase agreement (SPA) entered into between the respondent and two purchasers for the sale of the respondent's house erected on a piece of land held under H.S.(M) 1465/1989 PT 11381, Mukim Sungai Petani ("the property") for RM53,000. Since the purchasers wanted a maximum loan on the property, the appellant suggested that the purchase price of RM62,000 be stipulated in the SPA. The respondent agreed to the suggestion and executed the SPA (see the SPA dated 14 March 2006 at pp. 11 to 30 of appeal record).

**[5]** To complete the sale of the property, the appellant applied for a loan from Malaysia Building Society Bhd. ("MBSB") on behalf of the purchasers. A loan of RM55,800 was duly approved and released by way of two payments. The first payment of RM15,256.57 was made to the Housing Loans Division of the Treasury to settle the

A outstanding loan of the respondent ("the redemption sum") *vide* Malayan Banking Banker's cheque dated 9 June 2006. The second payment of RM40,543.43 being the balance of the loan (RM55,800 less the redemption sum of RM15,256.57) was paid to the appellant's firm *vide* Maybank cheque No: 249806 dated 25 August B 2006. The sum of RM40,543.43 was paid into the client's account of the appellant's firm as stakeholder for both the respondent and the purchasers. The money was to be utilised partly towards payment of the balance of the purchase price of RM37,743.43 to the respondent (the redemption sum being RM15,256.57) and the C balance of RM2,800 to be returned to the purchasers as beneficiaries of the loan.

**[6]** Unfortunately the respondent and the appellant quarelled with regard to the balance of the purchase price due to the respondent. D This led to the respondent making a written complaint to the Bar Council which was subsequently referred to the DB under s. 99 of the Act (see the complaint dated 8 March 2007 at pp 8 to 10 of the appeal record). The gist of the respondent's complaint is that the appellant had wrongly refused and/or neglected to pay her the E balance of the purchase price.

**[7]** Pursuant to s. 100(3) of the Act, the appellant furnished a written explanation to the DB in answer to the complaint (see written explanation dated 13 December 2008 at pp. 105 to 107 of the appeal record). According to the written explanation of the F appellant, the respondent had agreed to pay him RM3,000 for negotiating the sale of the property together with the sum of RM5,000 owed to him by the respondent's husband. The appellant was willing to pay the respondent the balance of the purchase price provided the debt of RM8,000 was set – off against the balance of G the purchase price. As the respondent refused to acknowledge the debt, the appellant withheld the balance loan payment due to the respondent.

**[8]** Be that as it may, in accordance with s. 103A(1)(a) of the H Act, the DB decided to appoint a Disciplinary Committee ("DC") to investigate the complaint and report its findings to the DB.

**[9]** The 3-member panel of the DC made the findings and recommendation to the DB as follows:

I

**Report of the Disciplinary Committee**

**Finding of facts**

The respondent had misappropriated RM40,543.43 received from Maybank Kuala Lumpur main branch. That money is payable towards the purchase price due to the complainant. The respondent's statement at pages 98-106 of the record of complaint does not absolve him but implicate him of additional breach such as assisting the parties to make fraudulent agreement ie, putting up a false purchase price of RM62,000.00 instead genuine price of RM53,000.00. He had attempted to collect fees of RM3,000.00 for the illegal service.

**[10]** The respondent's statement clearly shows that he did not understand the duties and responsibilities of his own profession.

**[11]** The respondent has committed an offence of misappropriation of property. He is guilty of a misconduct under s. 94(3)(c) and (o) of the Legal Profession Act 1976.

**Recommendation:**

(a) After the complaint was made, the respondent had mitigated in making every effort to return the money to the complainant. He has paid up RM42,256.57 leaving a balance of only RM10,743.43 which his counsel had informed will be paid up soon.

(b) In view of the mitigating factor, a fine of Ringgit: Five Thousand (RM5,000) only may be imposed on the respondent.

**[12]** The report of the DC was sent and considered by the DB at its meeting held on 12 December 2008 and disagreed with the recommendation of the DC on the fine of RM5,000. Accordingly on 3 March 2009 the DB had issued a notice to the appellant under s. 103D(2), s. 103D(4) and s. 103D(5) of the Legal Profession Act 1976 to appear before the DB on 21 March 2009 and to make representations to the DB before the DB decides on the appropriate order to make as it deems fit. The notice dated 3 March 2009 reads as follows:

**Lembaga Tatatertib Peguam-peguam**
**Advocates & Solicitors Disciplinary Board**
8th & 9th Floor, Wisma Maran, 28 Medan Pasar,
50050 Kuala Lumpur

A.R. Registered & Certified of Posting

1. Encik Mohamad Jamaludin Bin Mohamad Amin
c/o Messrs Jamaludin Amin & Co.
Advocates & Solicitors
No. 302, 1st Floor, Taman Bandar Baru
08000 Sungai Petani, Kedah.

2. Encik Mohamad Jamaludin Bin Mohamad Amin
No. 2498-C, Lorong Alor Janggus
Kampung Selamat
13300 Gelugur, Penang.

Dear Sirs,

**Re: Complaint No : DC/07/2902**
**Complaint : Lans Koperal Zalina bt. Isa**
**Respondent : Mohamad Jamaludin Bin Mohamad Amin (previously practicing at Messrs Jamaludin Amin & Co.)**

1. We write to inform you that the Disciplinary Board has at its meeting held on 12 December 2008 considered the Report of the Disciplinary Committee on the complaint against you and disagreed with the recommendation of the DC with regards to punishment. Further, the Board was of the tentative view that an Order of restitution be made against you pursuant to s. 103D(5) of the Legal Profession Act 1976 (as Amended) to refund the sum in issue to the Complaint.

2. NOTICE is hereby given in accordance with s. 103D(2), s. 103D(4) and s. 103D(5) of the Act that you appear before the Disciplinary Board on 21 March 2009 at 9.00 a.m. at the premise of the Board on the 8th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur to make your representations to the Board before the Board decides on the appropriate order to make as it deems just.

3. TAKE NOTICE THAT in the event you are absent on the aforesaid date, the Board may proceed in your absence without any further reference to you.

4. A copy of the Report of the Disciplinary Committee is enclosed for your reference.

5. You are advised to bring the relevant documents along with you in sufficient copies and to be properly attired (court attire) on the hearing date.

Yours faithfully,

t.t.

Tomis Peter Samat

Director

Complaints Secretariat.

**[13]** The DB, having considered the report of the DC dated 18 August 2008 and upon hearing the appellant and his counsel, En. Aqbal Shiffuddin bin Adnan Sallehudin, had on 21 March 2009 ordered as follows:

a) that the appellant be suspended for three years from practice as an advocate & solicitor pursuant to s. 88A of the Legal Profession Act 1976, and

b) that the appellant do make restitution to the respondent of a sum of RM10,743.43 which was due and owing to the respondent to be paid with an interest at 8% per annum from the date of the order until payment to the respondent pursuant to s. 103D(5) of the Legal Profession Act 1976 within three months from the date of the order

**[14]** The appellant was notified of the order *vide* the DB's letter dated 3 April 2009 which is reproduced below:

**Lembaga Tatatertib Peguam-peguam**
**Advocates & Solicitors Disciplinary Board**
8th & 9th Floor, Wisma Maran, 28 Medan Pasar, 50050
Kuala Lumpur

Your Ref:

Our Ref: DC/07/2902/Order-S/nam

3 April 2009

1. En. Mohamad Jamaludin Bin Mohamad Amin
c/o Messrs Jamaludin Amin & Co.
Advocates & Solicitors
No. 302, 1st Floor, Taman Bandar Baru
08000 Sungai Petani, Kedah.

By A.R.Registered/Certificate of Posting

2. En. Mohamad Jamaludin Bin Mohamad Amin
No. 2498-C, Lorong Alor Janggus
Kampung Selamat
13300 Gelugur, Penang. By A.R.Registered/Certificate of Posting

Dear Sirs,

**Re: Complaint : No DC/07/2902**
**Complaint : Lans Koperal Zalina bt. Isa**
**Respondent: Mohamad Jamaludin Bin Mohamad Amin (previously practicing at Messrs Jamaludin Amin & Co.)**

We write to advise that the Disciplinary Board having considered the above complaint and the Report of the Disciplinary Committee, and upon hearing you and your Counsel, En. Aqbal Shiffuddin bin Adnan Sallehudin ordered that you be suspended from practice as an advocate and solicitor for a period of Three (3) years. The suspension is to take effect 21 days from the date of the Order dated 21 March 2009 and is to expire on 10 April 2012.

We enclose herewith a copy of the Order dated 21 March 2009 by way of service on you.

Pursuant to Section 88(2) of the Legal Profession Act, you shall within twenty-one (21) days from the date of suspension satisfy the Bar Council that you have made suitable arrangements as provided therein in relation to your practice.

The Disciplinary Board has further ordered that you have to refund the sum of RM10,743.43 with interest at 8% per annum from the date of the Order until payment to the Complainant pursuant to s. 103D(5) of the Act within three (3) months from the date the Order.

Yours faithfully,

t.t.

Tomis Peter Samat
Director
Complaints Secretariat

**[15]** The first salvo fired by the appellant's counsel that there was no evidence before the DC that the appellant had dishonestly and/or unlawfully withdrawn even a cent from the Client's Account or from the sum of RM40,543.43 held by him as a stakeholder. Or

that he had misappropriated, misused or converted to his own use the sum of RM40,543.43 or any part thereof or at all. The essence of the respondent's evidence was non-payment of the balance of the purchase price. In *Re an Advocate and Solicitor* [1940] MLJ 253 the court held that mere non-payment of money due to a client is not professional misconduct unless there is *deceit* or fraud or misappropriation. The burden of proof was on the respondent to establish that the appellant had misappropriated her money beyond reasonable doubt: see *Au Kong Weng v. Bar Committee Pahang* [1980] 1 LNS 4, *Keith Sellar v. Lee Kwang* [1980] 1 LNS 36 following *Bhandari v. Advocates Committee* [1956] 3 All ER 742. And not for the appellant to disprove the element of misappropriation.

**[16]** The learned counsel went on to submit that the order of suspension made by the DB is null and void as it had made an erroneous assumption that the appellant had misappropriated the sum of RM40,543.43, having considered the DC's report which was baseless and totally flawed. It is apparent on the face of the record that the order of the DB based on the wrong findings of the DC is conclusively invalid and has occasioned a serious miscarriage of justice that calls for this court intervention.

**[17]** The finding by the DC that the appellant had misappropriated the sum of RM40,543.43 was clearly a finding of fact. In *Mallal's Criminal Procedure*, 4th edn at p. 467 states that:

> There is a distinction between the finding of specific fact and finding of fact which is really an inference drawn from fact specifically found. In the case of the latter the appellate court will more readily form an independent opinion than in the case of the former which involve the evaluation of the evidence of the witnesses, particularly where the finding could be founded on their credibility or bearing.

**[18]** Misappropriation of property or money entrusted to legal practitioners is not only a misconduct within the Legal Profession Act 1976 but also a serious criminal offence. If dishonesty is established, even temporary retention is evidence of the offence. In the case of *Emperor v. Chaturbhu Narain Choudhury* AIR [1936] Patna 350 at p. 352, Rowland J said:

> To establish dishonesty therefore it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for his own benefit for a time, may be sufficient. It was so held in 8 Bom LR 951. (*Emperor v. Chhagan Lai*).

**[19]** The court is cautious to disturb the decision by the DB that the appellant's conduct is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute. The duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners is entrusted to the Bar Council and the DB. This is because members of the same profession should know and appreciate better than anyone else the standard of conduct expected of the legal profession. In *Gana Muthusamy v. Tetuan LM Ong & Co.* [1998] 4 CLJ 878, Gopal Sri Ram JCA (as he then was) had this to say:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Court must necessarily exercise caution when entertaining on appeal in which the control question is whether particular conduct in unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

**[20]** In similar vein, Abdul Malik Ishak J (as he then was) in *Marzaini Zainuddin v. Majlis Peguam Malaysia* [2007] 10 CLJ 339 said as follows:

> It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners.

This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, which consists of senior members of the Bar appointed under s. 93(3) of the Act, thought it fit to suspend the appellant based on the evidence presented to them. The DB should know better. In the words of Raja Azlan Shah CJ (Malaya) in *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4:

> Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

**[21]** Therefore, the learned counsel attack on the decision of the DB based on the allegedly wrong findings of the DC is devoid of merit. The appellant fails on this ground.

**[22]** The second ground raised by the learned counsel was relating to the notice (exh. MJ1) sent by the DC which was said to be bad in law and of no legal effect. The learned counsel argument runs as follows. According to para. 1 of the notice, it states that the DB disagreed with the recommendation of the DC with regard to punishment. Followed by para. 2 of the notice which states that the notice is given in accordance with s. 103D(2), s. 103D(4) and s. 103D(5) of the Act. It does not mention s. 103D(3) of the Act.

**[23]** Now let us examine the relevant provisions of the Act.

**[24]** Section 103D(2) reads:

> The Disciplinary Board may in appropriate cases impose a greater punishment that recommended by the Disciplinary Committee.

**[25]** Section 103D(3) reads:

> Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

**[26]** In contrasting both the sub-sections, sub-section (2) applies to those cases where the DB intends to enhance (greater) the punishment recommended by the DC. For instance the DB intends to increase the fine of RM5,000 recommended by the DC to RM10,000.

**[27]** However sub-section (3) applies to those cases where the DB does not agree with the recommendation of the DC and intends to make such other order of a different specie, for instance an order of suspension or striking off the rolls, as opposed to increasing the punishment imposed by the DC.

**[28]** In the instant case, as alluded above, the DB disagreed with the recommendation of the DC and made an order of suspension (such other order). Therefore, the DB acted under sub-section (3), rather than sub-section (2).

**[29]** Unfortunately the DB did not give the appellant a notice under sub-section (3). As the DB gave the appellant a notice under s. 103D(2) but acted under s. 103D(3), it contravened the mandatory provision of s. 103D(4) which nullified the whole proceedings of the DB. In the circumstances, the order of suspension made by the DB is null and void and of no legal effect.

**[30]** The DB's argument is as follows. As the DB does not agree with the recommendation of a fine of RM5,000 of the DC, it would appear that the DB had acted under s. 103D(3) of the Legal Profession Act 1976 in issuing the suspension order instead of the fine of RM5,000 as recommended by the DC.

**[31]** However, the DB had not cited s. 103D(3) in the said notice dated 3 March 2009 addressed to the appellant nor had the DB acted under s. 103D(2), in issuing the suspension order instead of the fine of RM5,000 as recommended by the DC.

**[32]** DB had not cited nor acted under s. 103D(3) in the said notice but had however cited and acted under s. 103D(2) for the following reasons:

i) Section 103D(3) caters to a situation where the DB does not agree with the finding or recommendation of the DC, and intends to make an order that may or may not be adverse against the advocate and solicitor concerned ie, ordering no punishment as in the case of the DB disagreeing with the finding of misconduct, ordering any one of the punishments under s. 100(8) of the Act as in the case of the DB disagreeing with the finding of no misconduct, or ordering a lesser punishment as in the case of the DB disagreeing with the recommendation;

ii) Section 103D(2) caters to a situation where the DB agrees with the finding of misconduct by the DB agrees to a situation where the DB agrees with the finding of misconduct by the DC, but intends to impose a greater punishment than that recommended by the DC;

iii) that as the DB does agree with the finding of misconduct by the DC but does not however agree that the recommendation of a fine of RM5,000 by the DC reflects the severity of the misconduct, the issue intended to be addressed under the said notice dated 3 March 2009 is obviously an issue of greater punishment under s. 103D(2);

iv) that the issue of a greater punishment than that recommended by the DC under s. 103D(2) presupposes a finding of misconduct by the DC as opposed to a 'finding or recommendation of the Disciplinary Committee' under s. 103D(3) which may or may not be adverse to the advocate and solicitor concerned and which the DB does not agree with;

v) that s. 103D(2) is clear and explicit in that the DB may impose a greater punishment than that recommended by the DC ie, a fine instead of a reprimand, a suspension instead of a fine and a striking off the roll instead of a suspension under s. 100(8) of the Act.

**[33]** The DB is entitled and justified to cite s. 103D(2) in the said notice dated 3 March 2009 and to act under s. 103D(3) in issuing the suspension order for three years against the appellant instead of a fine of RM5,000 as recommended by the DC.

**[34]** The said notice dated 3 March 2009 addressed to the appellant and issued in accordance with s. 103D(2), s. 103D(4) and s. 103D(5) leaves no doubt that the DB had in mind to do as follows:

i) to impose on the appellant a greater punishment than that recommended by the DC under s. 103D(2);

ii) to make an order under s. 103D(2) and hence, the notification by the DB of its intention to do so and to accord the appellant a reasonable opportunity to be heard under s. 103D(4); and

iii) to make an order of restitution to the respondent under s. 103D(5).

**[35]** The appellant could have no valid complaint against the said notice dated 3 March 2009 addressed to the appellant nor could the appellant have any valid complaint that s. 103D(3) instead of s. 103D(2) had been cited and acted upon by the DB.

**[36]** Be that as it may, the notice dated 3 March 2009 sent to the appellant informed him to appear before the DB on 21 March 2009, at about 9am at the DB's premises on the 8th Floor, Wisma Maran, 28 Medan Pasar, Kuala Lumpur to make representations before the DB decided on the appropriate order against him. A copy of the DC's report was also enclosed together with the notice for the appellant's reference. The appellant was also reminded that in the event of his absence on the scheduled date, the DB was at liberty to proceed in his absence. The notice dated 3 March 2009 is obviously a notice under s. 103D(4) which reads as follows:

**[37]** Section 103D(4)

> Before the Disciplinary Board makes an order under sub-section (2) or any order that is likely to be adverse against an advocate and solicitor under sub-section (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

**[38]** I have no doubt that the said Notice is sufficient compliance with s. 103D(4) which housed the doctrine of natural justice and procedural fairness.

**[39]** Further on in the alternative, the learned counsel submitted that the punishment imposed by the DB was excessive in the circumstances of this case citing the Federal Court case of *Selvaratnam Vellupillai v. Dr. Jayabalan Karrupiah* [2009] 1 CLJ 872. In this case the advocate and solicitor concerned had utilized the amount of RM21,223.83 of his client's money held by him as stakeholder towards settlement of his fees and disbursements. The DC found the solicitor guilty of misconduct under s. 94(3)(d), (n) and (o) of the Act and recommended to the DB that the solicitor be suspended from practice for a period of six (6) months. The DB pursuant to its powers under s. 103(D) of the Act decided that the solicitor be suspended from practice as an advocate and solicitor for six (6) months from the date of the order, 27 June 2003. The solicitor appealed to the High Court against the order of the DB but failed. He then appealed to the Federal Court. At the Federal Court the Chief Justice, Zaki Tun Azmi allowed the appeal and set

aside the order of suspension of six months of the DB and substituted it with a suspension of one month. The Hon. Chief Justice in his grounds of judgment said that he was sympathetic to the advocate and solicitor.

**[40]** In the instant case the appellant did not misappropriate or utilize even a cent of his client's money. Therefore when the punishment of suspension of three years is contrasted with the punishment of six months only imposed by the DC in the case of *Selvaratnam, supra* it is unjustified and violative of the equality provision conferred by art. 8 of the Federal Constitution (see *Thavanathan Balasubramanium v. Majlis Peguam Malaysia* [2003] 3 CLJ 770).

**[41]** The learned counsel urged this court to set aside the order of suspension imposed by the DB and/or substitute the order with the imposition of a lesser punishment as this court deems fit and proper.

**[42]** The facts in *Selvaratnam, supra* may be distinguished with the facts in the instant case. In *Selvaratnam*'s case, the recalcitrant advocate & solicitor sought the advice of the Bar Council and the Bar Council ignored him. The said advocate & solicitor did what he thought was his right by withdrawing the sum of RM21,223.83 from his client's account towards settlement of his fees and disbursements. On that score, the Honorable Chief Justice was sympathetic with him and set aside the order of suspension of six (6) months and substituted it with a suspension of one (1) month. In the present case, it was a factual finding by the DC that the appellant had misappropriated a sum of RM40,543.43. A further finding by the DC was that the appellant had drawn up a fraudulent agreement ie, by hiking up a false purchase price of RM62,000 instead of a genuine price of RM53,000. He then attempted to collect fees of RM3,000 for his illegal service. Therefore, to compare the order of three years of suspension in this case with the order of six months suspension in *Selvaratnam*'s case is misplaced. The imposition of punishment in the disciplinary proceedings under the Act cannot be standardised as punishments are discretionary, it must depend on each individual case and its mitigating factors.

A **[43]** I am of the view, the DB knows best (which this court is unaware of) why the suspension of three years was meted out on the appellant. On the facts of this case, the appellant too failed to conjure up any sympathy for me to reduce to a lesser punishment.

B **[44]** Based in the aforesaid reasons, I hereby affirmed the order made by the DB. The appellant's appeal is accordingly dismissed with costs to be paid by the appellant to the Bar Council and costs of proceedings before the DC under s. 108 of the Act.

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